APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED ON AUGUST 6, 2003

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 01-1385

LINDA HOFFMANN-PUGH,

Plaintiff-Appellee,

v.

MARY T. KEENAN, as District Attorney for the 20th Judicial District of the State of Colorado,

Defendant-Appellant.

JUDGES: Before SEYMOUR, HOLLOWAY and EBEL, Circuit Judges.

OPINION: SEYMOUR, Circuit Judge.

This case concerns the constitutionality of a Colorado statute governing the secrecy of grand jury investigations. Plaintiff Linda Hoffmann-Pugh worked as a housekeeper for John and Patsy Ramsey prior to the highly publicized murder of their daughter, JonBenet Ramsey. Due to her association with the Ramsey household, Ms. Hoffmann-Pugh was involved in the grand jury investigation of the murder. She now wishes to write a book about her experiences. Colorado requires a grand jury witness to take an oath not to

disclose her testimony, except to discuss it with her attorney or with the prosecutor, until and unless an indictment or report is issued. The oath thereby precludes the witness from divulging her testimony even after the term of the grand jury has ended if the investigation of the crime continues. Fearing prosecution under Colorado law for contempt if she discloses her grand jury testimony, Ms. Hoffmann-Pugh sought and was granted a judgment declaring she could not be prosecuted for revealing that information. The district court held that the Colorado secrecy rules violate the First and Fourteenth Amendments. The state appeals and we reverse.

I

Colorado Rules of Criminal Procedure 6.2 and 6.3 provide that the proceedings of the grand jury shall be secret and the grand jury witnesses must take an oath to keep their testimony secret. In pertinent part, Rule 6.2 states: All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law. Rule 6.3 provides, The following oath shall be administered to each witness testifying before the grand jury: DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR

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TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

Violations of the grand jury oath are punishable by contempt proceedings. Ms. Hoffmann-Pugh testified under the Rule 6.3 oath before the grand jury that investigated the murder of JonBenet Ramsey from 1998 until October 1999, when its term ended by law. No indictment or grand jury report concerning that murder has been issued. Because there is no statute of limitations on the crime of murder under Colorado law, however, a new grand jury could consider evidence and continue the investigation. Ms. Hoffmann-Pugh wants to write a book describing her grand jury testimony about this unsolved murder, discuss it with the media, and answer questions about it from members of the public. She has not done so for fear of facing contempt proceedings for violation of the grand jury secrecy requirements.

Ms. Hoffmann-Pugh claims, and the district court agreed, that the Colorado secrecy rules violate her First Amendment rights by requiring her to remain silent even after the grand jury ended its term without issuing an indictment or report. The district court determined that the Supreme Court's decision in *Butterworth v. Smith*, 494 U.S. 624, 108 L. Ed. 2d 572, 110 S. Ct. 1376 (1990), was controlling and granted summary judgment in favor of Ms. Hoffmann-Pugh. The court cited *Butterworth* as holding that to the extent a rule or statute "prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment." Aplt. App. at 128 (quoting *Butterworth*, 494 U.S. at 626).

We review the district court's grant of summary judgment de novo. *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). In doing so, we view the evidence and draw reasonable inferences in the light most favorable to the nonmoving party. *Id.* More specifically, the district court's interpretation of state rules of criminal procedure is an issue of law we review de novo. *United States v. Maher*, 919 F.2d 1482, 1485 (10th Cir. 1990). Likewise, challenges to the constitutionality of a statute as well as the district court's conclusion as to the constitutionality of a rule are issues requiring de novo review. *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir. 1995); *United States v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998).

II

In our judgment, *Butterworth* does not require invalidating Colorado's grand jury secrecy rules. In *Butterworth*, the Court considered a Florida statute permanently prohibiting a grand jury witness from disclosing not just his "testimony" but also the "content, gist, or import" thereof. Because that prohibition encompassed information the witness possessed prior to participating in the grand jury investigation, the Court determined the statute was unconstitutional. *See Butterworth*, 494 U.S. at 631-32. In making its determination, the Court distinguished its decision in *Seattle Times v. Rhinehart*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984), where it concluded the First Amendment was not infringed by a protective order prohibiting the disclosure of information obtained through judicially compelled discovery of otherwise private information. Comparing the situation in *Butterworth*, the

Court said: Here, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury. 494 U.S. at 632. *Butterworth* makes clear that the state cannot, by calling a person as a witness, prohibit her from disclosing information she possessed beforehand, that is, the substance itself of the information the witness was asked to divulge to the grand jury.

The Colorado statute is more narrowly drawn than the Florida statute at issue in *Butterworth*. The Florida statute specifically precluded disclosing the "gist or import" of the testimony, which clearly encompassed the substance of the knowledge the grand jury witness had before entering the grand jury process. The Colorado statute, by contrast, speaks only in terms of "testimony". The Colorado Supreme Court has explicitly referred to this distinction in discussing Rule 6.2: "Grand jury secrecy is intended only to prevent disclosure of what transpires or will transpire before the grand jury." *People v. Rickard*, 761 P.2d 188, 192 (Colo. 1988). The policy of secrecy is intended only to protect against disclosure of what is said or takes place in the grand jury room. But if a document is sought for itself, independently, rather than because it was presented to the grand jury, there is no bar to disclosure. The respondent . . . here is not inquiring into any facet of what is taking place within the grand jury room. Indeed, some of the documents have not yet been presented before the grand jury. Respondent asks only to see documents which have been, or may at some time be shown to a grand jury. The request is to see these

documents for an unrelated and independent purpose. The secrecy of the grand jury would not be violated by this procedure. *Granbery v. Dist. Court*, 187 Colo. 316, 531 P.2d 390, 393-94 (Colo. 1975) (citation omitted). Thus, the Colorado statute does not prohibit disclosure of information the witness already had independently of the grand jury process.

Ms. Hoffmann-Pugh apparently wishes to disclose more than information she possessed prior to her grand jury testimony. In her complaint, she refers to publishing a book that "will include her appearance before the Boulder grand jury . . . and recount her testimony." App., tab 2 at 3. She also refers to "questions addressed to her before the Boulder grand jury, and her answers." *Id.* She says she wants to relate publicly "her experience and testimony before the grand jury." *Id.* at 5. But as the Court recognized in *Butterworth*, "grand jury secrecy remains important to safeguard a number of different interests" to preserve its proper functioning. *Id.* Reading *Butterworth* in light of *Rhinehart*, we are convinced a line should be drawn between information the witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process.

As one treatise explains: "*Butterworth* does not necessarily preclude a permanent disclosure prohibition . . . where that prohibition is limited to a discussion of the specific content of the witness' testimony before the grand jury as opposed to the witness' knowledge of events discussed in that testimony." 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE,

§ 8.5(d) at 78 (2d ed. 1999) (discussing *Butterworth* and its application in *State v. Heltzel*, 552 N.E.2d 31 (Ind. 1990)). The treatise clarifies: "Full disclosure of the testimony could encompass information learned through the testimony, such as prosecution strategy (as indicated by the questions of prosecutors or grand jurors) and the differing perspectives of other witnesses (as indicated by those questions)." *Id.* at 78 n.109. In our judgment, drawing the line at what Ms. Hoffmann-Pugh knew prior to testifying before the grand jury protects her First Amendment right to speak while preserving the state's interest in grand jury secrecy.

We note, moreover, that there is a way for Hoffman-Pugh to free herself even from this restriction. Rule 6.9 of the Colorado Rules of Criminal Procedure permits a witness to apply to the court overseeing the grand jury for a copy of the witness' testimony and a determination that secrecy is no longer required. Colo. R. Crim. P. 6.9(b)(c). This rule provides a mechanism for Hoffman-Pugh to free herself of the restriction on her disclosure of her grand jury testimony at such time as the investigation is truly closed and the state no longer has a legitimate interest in preserving the secrecy of that testimony.

In sum, we agree with the state that the Colorado grand jury secrecy rules, as limited by the Colorado Supreme Court in *Rickard*, do not preclude Ms. Hoffmann-Pugh from disclosing information she possessed prior to her grand jury appearance. Contrary to the district court, we hold that the Colorado secrecy rules do not violate the First Amendment by prohibiting the disclosure of matters Ms. Hoffmann-Pugh learned from her participation in the grand jury process,

at least so long as the potential remains for another grand jury to be called to investigate an unsolved murder.

Accordingly, we **REVERSE** the district court's grant of summary judgment to Ms. Hoffmann-Pugh and **REMAND** for further proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED JULY 6, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 00-D-1597

LINDA HOFFMAN-PUGH,

Plaintiff,

v.

MARY T. KEENAN, as District Attorney for the 20th Judicial District of the State of Colorado,

Defendant.

ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Summary Judgment filed April 17, 2001. A hearing on the Motion was held on Thursday, July 5, 2001. Through this Motion, Plaintiff seeks a declaration that Colorado Rules of Criminal Procedure 6.2 and 6.3 are unconstitutional. The parties agree that no genuine issues of material fact exist based on the Stipulation of Undisputed Facts which was filed on April 17, 2001, as part of the Motion for Summary Judgment. The Stipulation is attached hereto as Appendix A and incorporated herein by reference.

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Granting summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1534 (10th Cir.), *cert. denied*, 114 S.Ct. 81 (1993); *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 242 (10th Cir. 1991); *Metz v. United States*, 933 F.2d 802, 804 (10th Cir.), *cert. denied*, 112 S.Ct. 416 (1991).

As a threshold matter, Defendant argued at the July 5, 2001, hearing that she does not challenge Plaintiff's right to reveal the information she possessed about the Jon Benet Ramsey homicide prior to testifying before the grand jury. Instead, Defendant argued that Rules 6.2 and 6.3 prohibit Plaintiff from disclosing the details of the grand jury proceedings (e.g. the specific questions she was asked, what she answered, and the grand jurors' reactions to her answers). Aside from the difficulties in separating Plaintiff's knowledge prior to testifying from the answers she gave to questions asked as part of grand jury proceedings, Defendant's argument does not comport with the plain language of the rules.[1] The rules themselves prohibit Plaintiff precisely from disclosing her "testimony."

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1. Colo. R. Crim. P. 6.2, in pertinent part, provides "(a) All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law. . . .

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The Supreme Court in *Butterworth v. Smith*, 494 U.S. 624 (1990), addressed such a prohibition holding that insofar as a statute or rule "prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution." *Id.* at 626. I find that *Butterworth*'s holding is dispositive and requires me to grant Plaintiff's Motion.

Defendant seeks to distinguish *Butterworth*. First, she argues that the statute considered in *Butterworth* was broader than the Colorado rules. Specifically, it prohibited a grand jury witness from disclosing not only his "testimony," but also from disclosing the "gist or import thereof." While the rules at issue in this case do not explicitly prevent disclosure of the "gist or import thereof," their practical effect does just this. The, meaning of "testimony" in Rule 6.3 is vague, and there is no bright line separating a witness' testimony from the "gist or import thereof." Only by defining "testimony" as limited to the verbatim words spoken by the witness before the grand jury could such separation be achieved. Neither party argues that such a definition is operative.

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Colo. R. Crim. P. 6.3 provides, "The following oath shall be administered to each witness testifying before the grand jury: DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

Second, Defendant argues that while *Butterworth* considered only a witness' right to "divulge information of which he was in possession before he testified before the grand jury," she challenges Plaintiff's right to divulge "information which [s]he may have obtained as a result of [her] participation in the proceedings of the grand jury." *Id.* at 632. In the latter case, however, Plaintiff's right to divulge the information may be restricted only in the face of "a need to further a state interest of the highest order." *Id.* (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)). Such a restriction operates as part of a system of prior restraints. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citations and quotations omitted).

As stated on the record at the hearing, I find that Defendant presents no "interest of the highest order" in support of her restriction and therefore fails to carry her burden. That no such interest exists is highlighted by the fact that this case addresses only the situation where the term of a grand jury, in which the witness' testimony was given, has already ended. Moreover, *Butterworth*'s discussion of grand jury secrecy, and recognition that the majority of states and the federal system do not have similar secrecy rules and nevertheless function well, further weigh against a finding of a compelling state interest.

Accordingly, it is

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ORDERED that Plaintiff's Motion for Summary Judgment filed April 17, 2001, is GRANTED. Insofar as Colorado Rules of Criminal Procedure 6.2 and 6.3 prohibit a grand jury witness from disclosing her own testimony after the term of the grand jury has ended, they violate the First Amendment to the United States Constitution. It is

FURTHER ORDERED that the Clerk of the Court shall enter Judgment in favor of Plaintiff, each party to bear its own costs and attorneys' fees.

DATED at Denver, Colorado, this 6th day of July, 2001.

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
United States District Court Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **00-D-1597 (W.Y.D.)**

LINDA HOFFMANN-PUGH,

Plaintiff,

v.

MARY T. KEENAN, as District Attorney for the 20th Judicial District of the State of Colorado,

Defendant.

STIPULATION OF UNDISPUTED FACTS

The parties hereby agree to the following undisputed facts:

1. A grand jury was convened in Boulder County in 1998, one of the purposes of which was to hear evidence in the JonBenet Ramsey murder investigation.

2. The Boulder grand jury's term ended in October, 1999 without issuing an indictment or report concerning the JonBenet Ramsey murder.

3. Under Colorado law, a grand jury term cannot exceed eighteen (18) months. C.R.S. 13-71-120.

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4. The crime of murder has no statute of limitations. C.R.S. 16-5-401(1)(a).

5. Under Colorado law, a new grand jury could consider evidence and continue the investigation in the JonBenet Ramsey murder investigation.

6. Defendant is unable to comment on whether or not Plaintiff testified before a grand jury due to grand jury secrecy rules. Defendant will not dispute Plaintiff's assertion that she provided sworn testimony to a grand jury hearing evidence in the investigation into the homicide of JonBenet Ramsey in Boulder County in 1999. Defendant will not dispute Plaintiff's assertion that she was required to take the "Oath of Witnesses" as stated in Rule 6.3.

7. Every witness who appears before a grand jury in the State of Colorado is required to take the "Oath of Witnesses," as it appears in Rule 6.3, administered before he or she testifies pursuant to Rule 6.2.

8. A witness who violates the provisions of Rule 6.2 and 6.3 could be subject to contempt proceedings before the chief judge (or designee) of the judicial district where the grand jury was impaneled. A violation of grand jury secrecy rules could result in penalties under criminal contempt proceedings.

9. Plaintiff has stated that she wishes to write about her grand jury testimony in a book, discuss her grand jury testimony with members of the media and answer questions about her grand jury testimony with those members of the public who are interested in questioning her about it.

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10. Plaintiff has stated that she has been unable to write about, or discuss her grand jury testimony with anyone but her attorney, because she is afraid the Boulder County District Attorney will bring the matter to the attention of the chief judge (or designee) of the judicial district where the grand jury was impaneled for contempt proceedings for violating her oath of secrecy.

11. Under Colorado law the duly elected district attorney of a judicial district is responsible for enforcing the criminal laws of the state within the applicable judicial district, and the district attorney takes an oath of office to uphold those laws.

Dated: April 10, 2001

APPROVED:

s/ Darnay Hoffman
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210 West 70th Street, #209
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(212) 712-2766

ATTORNEY FOR PLAINTIFF
LINDA HOFFMANN-PUGH

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s/ Andrew R. Macdonald
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ATTORNEY FOR DEFENDANT MARY KEENAN, as District Attorney for the 20th Judicial District of the State of Colorado

APPENDIX C – COLORADO RULES OF CRIMINAL PROCEDURE 6.2 & 6.3

Rule 6.2:

> All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law.

Rule 6.3:

> DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?